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ICONIX, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ICONIX, INC.,

Plaintiff,

v.

LANCE TOKUDA, JIA SHEN,
NETPICKLE, INC.,

Defendants.

Case No. C-06-02201 SBA (JCS)

**VERIFIED SECOND AMENDED
COMPLAINT FOR COPYRIGHT
INFRINGEMENT, LANHAM ACT
VIOLATIONS, BREACH OF
FIDUCIARY DUTY, BREACH OF
CONTRACT, INTERFERENCE
WITH CONTRACT,
CONVERSION, UNFAIR
COMPETITION,
CONSTRUCTIVE TRUST,
VIOLATION OF CALIFORNIA
PENAL CODE § 502(C), AND
VIOLATION OF THE
COMPUTER FRAUD AND
ABUSE ACT**

DEMAND FOR JURY TRIAL

Plaintiff Iconix, Inc. ("Iconix") alleges as follows:

1. Iconix brings this action against Defendants Lance Tokuda, Jia Shen, and netPickle, Inc. (collectively, "the Defendants"). This action arises out of wrongful conduct that began when

1 Dr. Tokuda and Mr. Shen were employed by Iconix and stole valuable inventions and software
2 code that are owned by Iconix.

3 **THE PARTIES**

4 2. Iconix is a corporation organized and existing under the laws of the state of Delaware
5 with its principal place of business in Mountain View, California.

6 3. Defendant Lance Tokuda (“Tokuda”) is a former employee and officer of Iconix;
7 Tokuda resides in Foster City, California.

8 4. Defendant Jia Shen (“Shen”) is a former employee of Iconix; Shen resides in East Palo
9 Alto, California.

10 5. Upon information and belief, Defendant netPickle, Inc. (“netPickle”) is a corporation
11 organized and existing under the laws of the State of Delaware and has its principal place of
12 business in Foster City, California, whose only two shareholders are Tokuda and Shen. At all
13 times relevant to this Complaint, netPickle, and its predecessor in interest, the entity dba
14 rockmyspace, acted in concert with Tokuda and Shen and with full knowledge of their actions
15 and was under Tokuda and Shen’s control.

16 **JURISDICTION AND VENUE**

17 6. This Court has subject matter jurisdiction over this action pursuant to, *inter alia*, 28
18 U.S.C. §§ 1331, 1338, 1367, 2201, the Copyright Act, 17 U.S.C. § 101, *et seq.*, and the Computer
19 Fraud and Abuse Act, 18 U.S.C. § 1030(g).

20 7. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because, *inter alia*,
21 plaintiff Iconix has its principal place of business in this district, a substantial part of the events
22 and omissions giving rise to the claims occurred here, and the Defendants reside in this district
23 and are subject to personal jurisdiction in this district.

24 **FACTUAL BACKGROUND**

25 8. Iconix provides email identity services that proactively combat email fraud spawned
26 by phishing. Phishing is a form of email fraud where senders impersonate legitimate businesses
27 and organizations to try to get recipients to divulge personal information such as passwords and
28

1 account numbers so the senders can steal the recipient's identity and/or funds from his or her
2 account.

3 9. Tokuda and Shen began their employment at Iconix in December of 2004.

4 10. Tokuda was the Vice President of Engineering and Chief Technology Officer at Iconix
5 and was in charge of setting the engineering and development direction for Iconix and for
6 managing the engineering team. Among other things, Tokuda supervised the development of
7 Iconix's new intellectual property and ideas.

8 11. Tokuda was an officer of Iconix.

9 12. Shen was the Manager of Client Development at Iconix and his responsibilities
10 included overseeing the work of software development.

11 13. As employees of Iconix, Tokuda and Shen both signed contracts entitled, "Proprietary
12 Information and Inventions Assignment Agreement" (the "Agreements"). The Agreements
13 provide, in pertinent part that Tokuda and Shen agree to disclose, assign, and transfer to Iconix
14 "any and all ideas, concepts, inventions, discoveries, developments, know-how, structures,
15 designs, formulas, algorithms, methods, products, processes, systems and technologies in any
16 stage of development that are conceived, developed or reduced to practice by [them] alone or
17 with others..."

18 14. The Agreements also provide that neither Tokuda, nor Shen would "solicit, induce,
19 recruit or encourage any person employed by [Iconix] to terminate his or her employment."

20 15. The Proprietary Information and Inventions Assignment Agreement that Tokuda
21 signed and the Proprietary Information and Inventions Assignment Agreement that Shen signed
22 are attached to this Complaint as Exhibits A and B respectively.

23 16. Moreover, both Tokuda and Shen were aware of Iconix's company policy, which
24 prohibited moonlighting. This policy is set forth in the Iconix employee handbook, a copy of
25 which was provided to both Tokuda and Shen when they started work at Iconix, and which both
26 have acknowledged receiving. Among other things, this anti-moonlighting policy prohibited the
27 defendants from engaging in any outside activity that created a conflict of interest with their
28

1 employment, and required them to obtain permission prior to engaging in any outside activity
2 which might create such a conflict of interest.

3 17. In the fall of 2005, Iconix was actively generating, developing, and evaluating ideas
4 for increasing traffic to Iconix's website. This activity included developing new features that
5 would entice consumers to download Iconix's email identity product.

6 18. Of particular interest to Iconix engineers was the ability to penetrate community
7 websites such as www.myspace.com, where web users create profiles and socially network with
8 one another.

9 19. In the fall of 2005, Iconix engineers, including Tokuda discussed the idea of creating a
10 customizable slideshow that would rotate through a user's pictures. The user would download
11 Iconix's email identity product and then be able to use the customizable slideshow.

12 20. Iconix continued to evaluate the customizable slideshow idea and began to test it as a
13 marketing strategy by the beginning of 2006.

14 21. In late December of 2005, Tokuda gave notice to Iconix. Tokuda's last day of
15 employment was January 23, 2006. At the time of his resignation and on his last day of
16 employment, when asked what he intended to do professionally, Tokuda responded that he had no
17 definite plans and was not sure.

18 22. On or about January 20, 2006, Iconix discovered that in or around October 2005,
19 while he was still an officer of Iconix, Tokuda secretly registered the domain name
20 rockmyspace.com. Prior to that time, Tokuda had covertly begun developing a customizable
21 slideshow feature for his own personal benefit.

22 23. While an Iconix officer, Tokuda also secretly formed his own company, netPickle
23 Inc., for the purpose of exploiting the customizable slideshow feature for his own benefit.

24 24. In addition, Tokuda began soliciting other Iconix personnel, including Shen, Ryo
25 Ishizuka, an Iconix engineer, and Bill Ames, the VP of Sales for Iconix and a member of the
26 Iconix Board of Directors, to join him in creating his own customizable slideshow business;
27 Tokuda's solicitation of Shen began on or before October 22, 2005.

1 25. Tokuda's solicitation of Iconix employees and the Defendants' development of a
2 competing customizable slideshow feature, website and business occurred on Iconix's company
3 time and through the use of Iconix's computers and the Iconix network. Defendants also used
4 other Iconix personnel to assist them in the development and operation of rockmyspace,
5 including, among others, Ryo Ishizuka and Bryan Talbot. Tokuda and Shen would monitor and
6 operate the rockmyspace website using their Iconix computers and over the Iconix network on a
7 daily basis, including while they were at work at Iconix.

8 26. Ultimately, upon information and belief, Tokuda and netPickle also registered the
9 domain name rockyou.com. In February 2006, Defendants began operating the website
10 previously known as www.rockmyspace.com using the new name www.rockyou.com, and
11 currently market their customizable slideshow feature using this domain name. The names
12 rockyou.com and rockmyspace.com are used interchangeably herein.

13 27. When Iconix found out that Shen helped Tokuda take Iconix's ideas and property to
14 form his own customizable slideshow business, Iconix was forced to terminate Shen's
15 employment. Defendants continued to use Iconix personnel and resources to do development
16 work for rockmyspace and netPickle even after they left Iconix. For example, Defendants
17 continued to direct Mr. Ishizuka to do development work and operational work for rockmyspace
18 using his Iconix computer even after they left Iconix. In early February 2006, at Shen's request,
19 and without any permission from Iconix, Ishizuka secretly uploaded a copy of Iconix's source
20 code onto one of the servers that Defendants were using for rockmyspace, and which also
21 contained the rockmyspace source code. On information and belief, Defendants were aware that
22 as an employee of Iconix, Ishizuka also had signed an Agreement with Iconix containing the
23 same material terms as the Agreements signed by Defendants Shen and Tokuda.

24 28. On March 13, 2006, Iconix sent the Defendants a letter requesting that they return the
25 customizable slideshow program and source code to its rightful owner, Iconix, and that they cease
26 and desist all other activity in which they are engaged that uses software or derivative works
27 owned by Iconix.

28 29. The Defendants refused to do so.

FIRST CLAIM FOR RELIEF: COPYRIGHT INFRINGEMENT
(Against All Defendants)

30. Iconix realleges and incorporates by reference paragraphs 1 through 29 from above.

31. Iconix holds a valid and enforceable copyright in and to the customizable slideshow software code.

32. Iconix has registered the copyright with the United States Copyright Office, Registration No. TXu1-272-636.

33. The Defendants have infringed Iconix's copyright by reproducing and distributing copies of this software code in violation of 17 U.S.C. § 106.

34. The Defendants have infringed Iconix's copyright by reproducing and distributing derivative works of this software code in violation of 17 U.S.C. § 106.

35. Iconix is entitled to an injunction, damages, profits attributable to the infringement not taken into account in computing actual damages and an award of attorneys' fees under 17 U.S.C. § 504.

SECOND CLAIM FOR RELIEF: LANHAM ACT
(Against All Defendants)

36. Iconix realleges and incorporates by reference paragraphs 1 through 29 from above.

37. On information and belief, the software code implementing the Defendants' customizable slideshow program, offered and sold by the Defendants contains code that is owned by Iconix.

38. In offering for sale and implementing customizable slideshow programs, the Defendants represent that they own and/or have a right to use all of the code implementing the customizable slideshow.

39. The Defendants' representation that they are the owners of the code implementing the customizable slideshow creates confusion as to the origin of their goods, services and other commercial activities.

40. Further, by failing to provide any attribution that Iconix is in fact the true owner of the customizable slideshow code, Iconix's contribution to the customizable slideshow program is

1 masked. This failure of attribution and designation constitutes “false designation of origin” under
2 Section 43(a) of the Lanham Act.

3 41. The Defendants’ acts constitute unfair competition and false designation of origin in
4 violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

5 42. The Defendants’ acts have irreparably damaged Iconix and will continue to so damage
6 Iconix unless restrained by this Court.

7 43. Plaintiff Iconix is entitled to an injunction under 15 U.S.C. § 1116, and to damages,
8 the Defendants’ profits, and the costs of this action under 15 U.S.C. § 1117.

9 44. The Defendants’ acts have been willful and with direct knowledge of Iconix’s
10 ownership interests, making this an “exceptional” case justifying an award against the
11 Defendants’ of treble damages, treble profits, and attorneys’ fees.

12 **THIRD CLAIM FOR RELIEF: BREACH OF FIDUCIARY DUTY**
13 **(Against All Defendants)**

14 45. Iconix realleges and incorporates by reference paragraphs 1 through 29 from above.

15 46. Throughout his employment at Iconix, defendant Tokuda was an officer of Iconix.

16 47. As an officer, Tokuda had a fiduciary duty to act in good faith and in the best interests
17 of Iconix.

18 48. Tokuda was entrusted by Iconix, in particular, with the responsibility of developing
19 new features that would entice consumers to download Iconix’s email identity product. Tokuda
20 breached his fiduciary duties to Iconix by, among other things, purporting to act on behalf of
21 Iconix, when in reality he was acting in furtherance of his own purposes; exploiting his position
22 and Iconix’s know how to create his own company that would compete with Iconix; furthering his
23 plot on Iconix’s company time and using Iconix’s resources to do so; inducing employees of
24 Iconix to work in furtherance of this scheme on Iconix’s company time and through the use of
25 Iconix’s company resources; covertly soliciting and/or inducing employees of Iconix to terminate
26 their employment at Iconix to join a competitor; stealing Iconix’s corporate opportunities for
27 himself; not disclosing ideas, concepts, and inventions that he was obligated to disclose to Iconix;
28 not cooperating in having the rights to his ideas, concepts, and inventions assigned to Iconix; and

1 engaging in outside activity that created a conflict of interest with his employment, and soliciting
2 others at Iconix to do so, despite the fact that this was expressly forbidden by Iconix's company
3 policy.

4 49. Despite his knowledge that Iconix was interested in penetrating community websites
5 by using new features such as a customizable slideshow, Tokuda did not pursue that goal for
6 Iconix. Instead he founded his own competing company and stole ideas belonging to Iconix for
7 his competing company.

8 50. Further, with knowledge that Tokuda's acts were in breach of his duty as an officer of
9 Iconix, Shen and netPickle aided and abetted this breach of fiduciary duty by providing
10 substantial assistance and encouragement to Tokuda that furthered Defendants' scheme against
11 Iconix. This assistance included, but was not limited to, actively developing the software code
12 and business and investor materials for netPickle and rockyou.com, using Iconix resources,
13 personnel and equipment and on Iconix time, soliciting Iconix employees, assisting Tokuda in
14 taking the corporate opportunity that belonged to Iconix and exploiting it for Defendants' own
15 use through the formation and operation of netPickle and rockyou.com; and helping to conceal
16 Defendants' wrongful actions from Iconix senior management. Shen's substantial assistance in
17 the tortious acts against Iconix were in breach of Shen's duties of loyalty as an employee and
18 manager of Iconix. Shen and netPickle's actions were a substantial factor in causing harm to
19 Iconix.

20 51. Because of Defendants' actions, Iconix has lost valuable employees and will be forced
21 to incur significant time and expense to replace them, has been hindered in its pursuit of a
22 customizable slideshow feature, and has been deprived of the corporate opportunity that Tokuda
23 has taken for his own benefit. As a result, Iconix has been damaged in an amount to be proven at
24 trial, and Defendants have been unjustly enriched in an amount to be proven at trial. In addition,
25 unless the Defendants are restrained from continuing to usurp the corporate opportunity that
26 belonged to Iconix and using property and ideas owned by Iconix, Iconix will be permanently and
27 irreparably harmed. Iconix therefore requests and is entitled to injunctive relief as described more
28 fully in the Prayer for Relief below.

1 52. The conduct of Defendants was willful, malicious, fraudulent, and in conscious
2 disregard of Iconix’s rights and interests and, upon information and belief, was undertaken with
3 the intent to injure Iconix’s property and legal rights. Accordingly, an award of exemplary
4 damages is justified.

5 **FOURTH CLAIM FOR RELIEF: BREACH OF CONTRACT**
6 **(Against Defendants Tokuda and Shen Only)**

7 53. Iconix realleges and incorporates by reference paragraphs 1 through 29 from above.

8 54. As employees of Iconix, Tokuda and Shen signed the Agreements.

9 55. The Agreements provide, in pertinent part, that Tokuda and Shen agree to disclose,
10 assign, and transfer to Iconix “any and all ideas, concepts, inventions, discoveries, developments,
11 know-how, structures, designs, formulas, algorithms, methods, products, processes, systems and
12 technologies in any stage of development that are conceived, developed or reduced to practice by
13 [them] alone or with others...”

14 56. The Agreements also provided that neither Tokuda, nor Shen would “solicit, induce,
15 recruit or encourage any person employed by [Iconix] to terminate his or her employment.”

16 57. The Agreements further provided that “for a period of one (1) year after termination of
17 my employment with the Company, I shall not directly or indirectly (i) divert or attempt to divert
18 from the Company (or any affiliate) any business of any kind...”

19 58. Both Tokuda and Shen expressly agreed that “[their] violation of th[e] Agreement
20 could cause [Iconix] irreparable harm and agree that [Iconix] shall have the right to apply to any
21 court of competent jurisdiction for an order restraining any breach of threatened breach of th[e]
22 Agreement.”

23 59. Both Tokuda and Shen breached the Agreements by not disclosing, assigning, and
24 transferring to Iconix all of their ideas, concepts, developments and know-how concerning
25 customizable slideshows despite the fact that those ideas and concepts belonged to Iconix, and by
26 creating a business based on ideas and technology that belonged to Iconix, using Iconix’s
27 resources to do so.

1 60. Tokuda and, upon information and belief, Shen, breached the Agreements by covertly
2 soliciting and/or inducing employees of Iconix to terminate their employment at Iconix to join a
3 competitor.

4 61. Iconix has fulfilled all of its obligations under the Agreements and is not in breach of
5 any of its covenants under the Agreements.

6 62. Tokuda and Shen's multiple breaches of the Agreements have caused Iconix damages
7 in an amount to proven at trial.

8 63. In addition, unless the Defendants are restrained from participating in competing
9 business and using property and ideas owned by Iconix, Iconix will be permanently and
10 irreparably harmed. Iconix therefore requests and is entitled to injunctive relief as described more
11 fully in the Prayer for Relief below.

12 **FIFTH CLAIM FOR RELIEF: INTERFERENCE WITH CONTRACT**
13 **(Against All Defendants)**

14 64. Iconix realleges and incorporates by reference paragraphs 1 through 29 and 45 through
15 63 from above.

16 65. On information and belief, Defendants Tokuda and netPickle were aware of Plaintiff's
17 Agreement with Shen and Iconix employee Ryo Ishizuka as a result of, among other things,
18 Tokuda's position as their supervisor.

19 66. On information and belief, Defendants Shen and netPickle were aware of Plaintiff's
20 Agreement with Tokuda and Iconix employee Ryo Ishizuka as a result of, among other things,
21 Shen's work with Tokuda and Shen's position as Ishizuka's direct supervisor.

22 67. Tokuda, Shen and Ishizuka breached the Agreements with Iconix by not disclosing,
23 assigning, and transferring to Iconix all of their ideas, concepts, developments and know-how
24 concerning customizable slideshows developed, conceived or reduced while they were employed
25 by Iconix, despite the fact that those ideas and concepts belonged to Iconix, and by creating a
26 business based on ideas and technology that belonged to Iconix, using Iconix's resources to do so.
27 Tokuda, Shen and Ishizuka also breached their Agreements with Iconix by taking Iconix's
28 proprietary source code without permission.

1 68. Defendants Tokuda and netPickle intentionally encouraged Shen to withhold ideas,
2 concepts, and know-how concerning customizable slideshows from Iconix, and instead to transfer
3 all rights in such ideas, concepts, developments and know-how to netPickle, all in breach of
4 Shen's Agreement with Iconix.

5 69. Defendants Shen and netPickle intentionally encouraged Tokuda to withhold ideas,
6 concepts, developments and know-how concerning customizable slideshows from Iconix, and
7 instead to transfer all rights in such ideas, concepts and know-how to netPickle, Inc., all in breach
8 of Tokuda's Agreement with Iconix.

9 70. On information and belief, Defendants Shen, Tokuda and netPickle intentionally
10 encouraged Ishizuka to transfer Iconix's proprietary source code to Defendants, and also
11 intentionally encouraged Ishizuka to withhold ideas, concepts, developments and know-how
12 concerning customizable slideshows from Iconix, and instead to transfer all rights in such ideas,
13 concepts, developments and know-how to netPickle, Inc., all in breach of Ishizuka's Agreement
14 with Iconix.

15 71. As a proximate result of Defendants' conduct and the above breach of the Agreements,
16 Iconix has suffered damages in an amount to be proven at trial.

17 72. In addition, Defendants' conduct has permanently and irreparably harmed Iconix.
18 Iconix is therefore entitled to injunctive relief as described more fully in the Prayer for Relief set
19 forth below.

20 73. Defendants' aforementioned conduct was willful, malicious, fraudulent and in
21 conscious disregard of Iconix's rights and interest, and, upon information and belief, was
22 undertaken with the intent to injure Iconix's property and legal rights. Accordingly, an award of
23 exemplary damages is justified.

24 **SIXTH CLAIM FOR RELIEF: CONVERSION**
25 **(Against All Defendants)**

26 74. Iconix realleges and incorporates by reference paragraphs 1 through 73 from above.
27
28

1 75. From the beginning of its development through the present, Iconix owned and had the
2 right to possess the rockmyspace.com business and website, including the software code and
3 materials used to operate the website.

4 76. Defendants, individually and collectively, wrongfully converted ownership and
5 possession of the rockmyspace.com website, business and associated materials developed at
6 Iconix to their own use, while excluding the rightful owner Iconix from its rights to ownership
7 and possession.

8 77. On or about January 13, 2006, Defendants Shen and Tokuda wrongfully purported to
9 transfer ownership of all rights relating to the rockmyspace.com website to netPickle, Inc. in
10 exchange for shares of stock in Defendant netPickle, Inc. In turn, Defendant netPickle, Inc.
11 wrongfully purported to purchase all rights relating to the rockmyspace.com website from
12 Defendants Shen and Tokuda.

13 78. By these actions, Defendants have damaged and are continuing to damage Iconix in an
14 amount to be proven at trial, including the loss of value of the website, business, and associated
15 materials developed at Iconix, as well as time and money expended seeking to recover Iconix's
16 property from Defendants.

17 79. Being deprived of the ownership and possession of the property described above has
18 permanently and irreparably harmed Iconix. Iconix is therefore entitled to injunctive relief as
19 described more fully in the Prayer for Relief set forth below.

20 80. The conduct of all Defendants in converting Iconix's property was willful, malicious,
21 fraudulent and in conscious disregard of Iconix's rights and interest, and, upon information and
22 belief, was undertaken with the intent to injure Iconix's property and legal rights. Further, despite
23 knowing of Iconix's interest in the converted property, and despite Iconix notifying Defendants of
24 its interest, Defendants failed and refused, and continue to fail and refuse, to return the property.
25 Accordingly, an award of exemplary damages is justified.

SEVENTH CLAIM FOR RELIEF: UNFAIR COMPETITION
(Against All Defendants)

81. Iconix realleges and incorporates by reference paragraphs 1 through 29 and 45 through 80 above, and paragraphs 94 through 102 below.

82. The Defendants have engaged in unlawful, unfair, and fraudulent business acts. The Defendants knowingly engaged in unfair competition within the meaning of California Business and Professions Code section 17200 by, among other things, exploiting Tokuda and Shen's positions at Iconix and Iconix's know how to create a company that would compete with Iconix; furthering their plot on Iconix's company time and using Iconix's resources to do so; inducing employees of Iconix to work in furtherance of this scheme on Iconix's company time and through the use of Iconix's company resources, even after Tokuda and Shen left Iconix; covertly soliciting and/or inducing employees of Iconix to terminate their employment at Iconix to join a competitor; stealing Iconix's corporate opportunities for themselves; not disclosing ideas, concepts, and inventions that Tokuda and Shen were obligated to disclose to Iconix; not cooperating in having the rights to Tokuda and Shen's ideas, concepts, and inventions assigned to Iconix; engaging in activities that created a conflict of interest with Tokuda and Shen's employment, despite the fact that this was expressly forbidden by Iconix's company policy, and stealing ideas and work belonging to Iconix and passing them off as their own.

83. Defendants further engaged in unfair competition under section 17200 by violating Labor Code sections 2859 and 2863, by breaching and aiding and abetting breach of fiduciary duty, by converting Iconix's business property, by interfering in Iconix's contracts with its employees, and by violating California Penal Code section 502(c) and 18 U.S.C. section 1030(a).

84. The Defendants deceived Iconix by not disclosing to Iconix ideas and inventions that are owned by Iconix despite their obligation to do so and by purporting to act on Iconix's behalf and in its best interests while setting up their own competing enterprise. The Defendants also misrepresented that they are the owners of the code implementing the customizable slideshow. These actions deceive the public as to the source of the products marketed by the Defendants, which, in reality, are based on technology developed at and owned by Iconix.

1 85. Defendants knew that the conduct described above was improper and that they were
2 unlawfully and fraudulently stealing Iconix's ideas and property when they sought to found a
3 competing business.

4 86. The unfair practices are continuing in that the Defendants have refused to return
5 Iconix's property to Iconix and to stop using Iconix's software code and materials.

6 87. As a direct and proximate result of this conduct, the Defendants have received, and are
7 making use of technology that rightfully belongs to Iconix.

8 88. Accordingly, Iconix is entitled to restitution and the return of its technology.

9 89. Iconix is further entitled to a temporary, preliminary, and permanent injunction
10 pursuant to Business and Professions Code section 17203 as described more fully in the Prayer
11 for Relief below.

12 **EIGHTH CLAIM FOR RELIEF: CONSTRUCTIVE TRUST**
13 **(Against All Defendants)**

14 90. Iconix realleges and incorporates by reference paragraphs 1 through 89 above.

15 91. Through purposeful violation of trust and other wrongful acts as described herein,
16 Defendants wrongfully gained property and benefits that rightfully belong to Iconix.

17 92. As a result of Defendants' wrongful gains, upon information and belief, Defendants
18 have been unjustly enriched, and have unjustly retained that benefit.

19 93. Equity demands that the property and benefits wrongfully gained by Defendants,
20 including software code taken from Iconix, and all derivatives thereof, and all materials
21 associated with the operation of netPickle, Inc., and any related entity or website, and all assets,
22 earning and other benefits derived from netPickle, Inc., and any related entity or website, be held
23 in constructive trust for Iconix, and that the right, title and interest to netPickle and any related
24 entity or website be transferred to Iconix, and that a proper accounting should be delivered to
25 Iconix.

26 **NINTH CLAIM FOR RELIEF: PENAL CODE § 502(c)**
27 **(Against All Defendants)**

28 94. Iconix realleges and incorporates by reference paragraphs 1 through 29 above.

1 95. California Penal Code section 502(c)(1) makes it a public offense for any person
2 knowingly to access and without permission alter, damage, delete, destroy, or otherwise use any
3 data, computer, computer system, or computer network in order to either devise or execute any
4 scheme or artifice to defraud, deceive, or extort, or wrongfully control or obtain money, property,
5 or data.

6 96. California Penal Code section 502(c)(2) makes it a public offense for any person
7 knowingly to access and without permission take, copy, or makes use of any data from a
8 computer, computer system, or computer network, or take or copy any supporting documentation,
9 whether existing or residing internal or external to a computer, computer system, or computer
10 network.

11 97. California Penal Code section 502(c)(4) makes it a public offense for any person
12 knowingly to access and without permission add, alter, damage, delete, or destroy any data,
13 computer software, or computer programs which reside or exist internal or external to a computer,
14 computer system, or computer network.

15 98. Defendants violated Penal Code section 502(c) by, among other things: accessing and
16 using the Iconix computers and computer systems to secretly operate and develop the website
17 rockmyspace.com for their own benefit and to further their own fraudulent scheme; to take and
18 copy the software code and other materials used to operate the rockmyspace website and
19 business; to delete from the Iconix computers that had been issued to them the software code at
20 issue in this lawsuit and other materials relating to the operation of the rockmyspace.com website
21 and their work at Iconix, and by stealing a copy of the Iconix source code from the Iconix
22 computers and network without authorization after their employment had been terminated, and by
23 uploading a copy of that source code onto a server used for rockmyspace.

24 99. Defendants had no permission from Iconix to perform any of these acts. Defendants
25 had, in fact, signed computer usage agreements providing that information on Iconix company
26 computers was company property, that such information was not to be transferred or stored on
27 non-company machines or disks, and that Iconix computers and the Iconix network were not to be
28 used for personal use.

100. Defendants' actions were undertaken in furtherance of the wrongful and scheme described in detail above, and were designed to defraud and deceive Iconix and to wrongfully obtain control over property and data that rightfully belonged to Iconix.

101. As a direct and proximate cause of Defendants' acts, Iconix has suffered and will continue to suffer injury and, pursuant to California Penal Code section 502(e)(1), are entitled to an injunction and damages in an amount to be proven at trial.

102. Iconix is further entitled to an award of attorneys' fees pursuant to California Penal Code section 502(e)(2).

103. By these acts, Defendants are guilty of oppression, fraud, malice, and wanton disregard of Iconix's rights, thereby entitling Iconix to punitive damages pursuant to California Penal Code section 502(e)(4), in an amount to be proven at trial.

TENTH CLAIM FOR RELIEF: COMPUTER FRAUD AND ABUSE ACT
(Against All Defendants)

104. Iconix realleges and incorporates by reference paragraphs 1 through 29 and 93 through 102 above.

105. 18 U.S.C. section 1030(a)(2)(C) makes it a public offense for any person to intentionally access a computer or exceed authorized access and thereby obtain information from any computer used in interstate commerce or communication without authorization if the conduct involves interstate commerce.

106. 18 U.S.C. section 1030(a)(4) makes it a public offense to knowingly and with intent to defraud access a computer used in interstate commerce or communication without authorization or exceed authorized access, and by means of such conduct further the intended fraud and obtain anything of value unless the object of the fraud and the thing obtained is only use of the computer and the value of such use is not more than \$5,000 in any one year period.

107. 18 U.S.C. section 1030(a)(5)(ii) makes it a public offense for any person to intentionally access a computer used in interstate commerce or communication without authorization, and as a result of such conduct, recklessly cause damage to another person, resulting in loss to one or more persons in a one-year period of at least \$5,000.

108. 18 U.S.C. section 1030(a)(5)(iii) makes it a public offense for any person to intentionally access a computer used in interstate commerce or communication without authorization, resulting in loss to one or more persons in a one-year period of at least \$5,000.

109. Iconix's computer networks and computer systems are used in interstate commerce and interstate communication.

110. Through the conduct described above, including without limitation the conduct described in paragraphs 97 through 99, which involves interstate commerce, Defendants violated 18 U.S.C. sections 1030(a)(2)(C), 1030(a)(4), 1030(a)(5)(ii), and 1030(a)(5)(iii).

111. Defendants had no permission from Iconix to perform any of these acts.

112. Defendants' conduct recklessly caused damage to Iconix in an amount to be proven at trial exceeding \$5,000.

113. In addition, Defendants' conduct has permanently and irreparably harmed Iconix. Iconix is entitled to injunctive relief pursuant to 18 U.S.C. section 1030(g) as described more fully in the Prayer for Relief set forth below.

PRAYER FOR RELIEF

WHEREFORE, Iconix prays for a judgment against the Defendants that:

1. Temporarily, preliminarily, and permanently enjoins the Defendants from (1) copying or distributing Iconix's copyrighted software code and from creating derivative works of Iconix's copyrighted software code; (2) further violations of Section 43(a) of the Lanham Act; (3) retaining or using Iconix's technology or "any and all ideas, concepts, inventions, discoveries, developments, know-how, structures, designs, formulas, algorithms, methods, products, processes, systems and technologies in any stage of development" assigned by Defendants to Iconix under the terms of their Agreements; (4) use of the rockmyspace.com and rockyou.com websites; (5) continuing to deprive Iconix of the corporate opportunity that rightfully belongs to it;

2. Awards Iconix damages (actual or statutory, if Iconix were to elect statutory damages), profits attributable to the infringement not taken into account in computing actual

1 damages and an award of attorneys' fees under 17 U.S.C. § 504 for Iconix's copyright
2 infringement;

3 3. Declares that the Defendants have engaged in willful copyright infringement under 17
4 U.S.C. § 504(c);

5 4. Declares that Iconix owns the copyright to all customizable slideshow software and
6 source code written by (or written at the direction of) Tokuda and/or Shen after their employment
7 at Iconix began and that Iconix owns the rockyou.com website and associated business and
8 materials developed at Iconix;

9 5. Awards compensatory damages in an amount to be proven at trial arising from the
10 Defendants' violations of the Lanham Act;

11 6. Awards to Iconix injunctive relief, compensatory and punitive damages in an amount
12 to be proven at trial and an award of attorneys' fees arising from Defendants' violations of
13 California Penal Code section 502(c);

14 7. Awards to Iconix injunctive relief and damages in an amount to be proven at trial
15 arising from Defendants' violations of the Computer Fraud and Abuse Act;

16 8. Awards to Iconix an accounting of Defendants' earnings and profits and an award of
17 those earnings and profits in an amount to be proven at trial;

18 9. Awards to Iconix the amounts by which Defendants have been unjustly enriched in an
19 amount to be proven at trial;

20 10. Awards to Iconix the value of the rockmyspace.com website and business at the times
21 they were converted by Defendants in an amount to be proven at trial, or, in the alternative,
22 damages to Iconix from Defendants' conversion of the rockmyspace website and business in an
23 amount to be proven at trial;

24 11. Imposes a constructive trust for the benefit of Iconix on the rockyou.com website and
25 business, the software code taken from Iconix, and all derivatives thereof, and all materials
26 associated with the operation of netPickle, Inc., and any related entity or website, and all assets,
27 earning and other benefits derived from netPickle, Inc., and any related entity or website; that
28

1 requires that a proper accounting be delivered to Iconix; and requires that the right, title and
2 interest to netPickle and any related entity or website be transferred to Iconix;

3 12. Awards Iconix its costs and expenses of suit incurred and attorneys' fees as allowed
4 by law;

5 13. Awards treble damages for willful violations of the Lanham Act;

6 14. Awards restitution and the return of all material owned by Iconix that is in the
7 Defendants' possession, custody, or control;

8 15. Awards specific performance of The Agreements by requiring the Defendants to
9 assign and transfer to Iconix all customizable slideshow software and source code written by (or
10 written at the direction of) Tokuda and/or Shen after their employment at Iconix began, as well
11 as, "any and all ideas, concepts, inventions, discoveries, developments, know-how, structures,
12 designs, formulas, algorithms, methods, products, processes, systems and technologies in any
13 stage of development" that were "conceived, developed or reduced to practice by [them] alone or
14 with others;"

15 16. Awards punitive damages in an amount to be established at trial; and

16 17. Grants Iconix such other and further relief as the Court may deem proper.

17 Dated: September 12, 2006

KENNETH A. KUWAYTI
ERIC S. WALTERS
SUSAN VASTANO VAUGHN
DAN WAN
MORRISON & FOERSTER LLP

21 By: /s/ Kenneth A. Kuwayti /s/
Kenneth A. Kuwayti

23 Attorneys for Plaintiff
ICONIX, INC.

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JURY DEMAND

Pursuant to Federal Rule of Civil Procedure 38(b), Iconix, Inc. hereby demands trial by jury of all issues properly triable thereby.

Dated: September 12, 2006

KENNETH A. KUWAYTI
ERIC S. WALTERS
SUSAN VASTANO VAUGHN
DAN WAN
MORRISON & FOERSTER LLP

By: /s/ Kenneth A. Kuwayti /s/
Kenneth A. Kuwayti

Attorneys for Plaintiff
ICONIX, INC.

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FED. R. CIV. P. 7.1 DISCLOSURE AND
CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

Pursuant to Federal Rule of Civil Procedure 7.1, Iconix, Inc. states that it has no parent corporation, and no publicly traded corporation owns 10% or more of the stock of Iconix, Inc.

Pursuant to Local Rule 3-16, the undersigned certifies that as of this date, other than the named parties, there is no such interest to report.

Dated: September 12, 2006

KENNETH A. KUWAYTI
ERIC S. WALTERS
SUSAN VASTANO VAUGHAN
DAN WAN
MORRISON & FOERSTER LLP

By: /s/ Kenneth A. Kuwayti /s/
Kenneth A. Kuwayti

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ICONIX, INC.